SUPREME COURT, U. S.

Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1971

No. 71-1424

JAMES W. FITZGERALD, *Petitioner*

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO, *Respondent*

SOUTHERN PACIFIC COMPANY, a corporation, *Real Party in Interest*

PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI to the Supreme Court of the State of California

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Pursuant to Rule 24, subdivision 4, and with reference to the points raised by the Southern Pacific Company in their brief in opposition, we urge that the cases cited by the railroad attorneys do not in any way conform to the latest ruling of this court on the whole subject. In *Pope v. Atlantic Coast Lines,* 345

U.S. 379, 97 L.Ed. 1094, 73 S.Ct. 849, that court stated that there is no federal statutory or other authorization for a state court to dismiss an F.E.L.A. case properly brought under §6 of the Act.

As stated in *Pope,* §1404(a) of the Judicial Code, allowing transfer only speaks to federal courts: "It does not speak to state courts to allow a dismissal of an F.E.L.A. action." It would take an Act of Congress to apply §1404(a) of the Judicial Code to state courts, and no such federal action has been taken. Consequently, *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, is not in point as to F.E.L.A. cases. The case of *Great Northern Ry. Co. v. Superior Court,* 12 Cal.App.3d 105 (1970), based on *Gulf Oil Corp. v. Gilbert,* supra, is no more applicable than is the *Gulf Oil Corp.* case.

Similarly, since the federal law is supreme and the legislative intent to allow the plaintiff to bring the action wherever the railroad does business is made clear by *Baltimore and Ohio R. Co. v. Kepner,* 314 U.S. 44, 86 L.Ed. 28, the California forum non conveniens statute could not amend the federal rule.

Of most importance, respondent's brief in no way answers the points made in our brief as to the fact that California allows a transitory action on a debt to be brought where the debtor is found and that it would be a violation of the "Privileges and Immunities" clause of the Federal Constitution to allow California to discriminate against the F.E.L.A. plaintiff. *McKnett v. St. Louis & S.F.R. Co.,* 292 U.S. 230, 78 L.ed. 1227, 54 S.Ct. 690 (Alabama). We can only conclude that there is such an obvious discrimination

in this regard under the California cases we cited that the railroad had no answer to this point.

The issue boils down to the simple fact that in *Missouri v. Mayfield,* 340 U.S. 1, this court by a divided opinion applied §1404(a) of the Judicial Code to F.E.L.A. actions and then later in *Pope v. Atlantic Coast Lines,* supra, expressly limited the application of §1404(a) to federal courts, stating that it would require an Act of Congress to make it apply to state courts. There has been no such act of Congress, and the *Pope* case is still the law.

Dated, Oakland, California,
June 5, 1972.

Respectfully submitted,
CLIFTON HILDEBRAND,
Attorney for Petitioner.